REPUBLIC OF KENYA

THE NATIONAL ENVIRONMENTAL TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NUMBER NET 003 OF 2019

ENDMOR STEEL MILLERS LIMITED.....APPELLANT

=VERSUS=

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY..RESPONDENT

NAZIR HUSSAIN HAKADA.....1ST INTERESTED PARTY

OCHIENG SILVANUS ACHAR.....2ND INTERESTED PARTY

JOHN MUTINDA MWANZIA.....3RD INTERESTED PARTY

FRANKLIN MAINA GATHERU.....4TH INTERESTED PARTY

RONNY ODIPO OKUL.....5TH INTERESTED PARTY

KEVIN MIGWE KIMWATU.....6TH INTERESTED PARTY

JUDGMENT

1. The Appeal before the Tribunal is dated 4th February 2019 and was filed on 5th February 2019 by the Appellant. The Appeal seeks the following orders:

a. That the Honourable Tribunal does order and declare that the Respondent's decision contained in the letter dated 4th January 2019 and served on 4th February 2019 is null and void;

b. That the Respondent be ordered to immediately withdraw the said letter dated 4th January 2019 and served on 4th February 2019 and lift the stop order and all other directives and orders contained in the aid (sic) letter;

c. Costs of the Appeal be borne by the Respondent; and

d. Any other relief that the Honourable Tribunal may deem fit and just to grant.

2. The Appeal is based on the following summarized grounds:

a. That the Appellant is a steel milling factory which was granted an EIA licence by the Respondent on 28th October 2013 and has been in operation from June 2016;

b. The Appellant has been using modern technology for noise and emissions control and its equipment is not only fairly modern, well serviced and maintained but also built to world class standards for environmental protection, prevention and control of pollution and ecological deterioration;

c. The Respondent's officers conducted an impromptu visit to the Appellant's factory on 24th January 2019 but did not leave any complaint or recommendation at all only to issue a closure notice dated 4th January 2019 which the Respondent later corrected to say that it was meant to have been dated 4th February 2019;

d. The Appellant has always allowed the Respondent to access its factory and does not have any outstanding directives from the Respondent. In July 2018, the Appellant submitted its annual source emission, ambient air quality assessment and environmental noise assessment reports as required by law and in August 2018, the Appellant submitted a self-assessment audit report for purposes of renewing its licence and paid for a licence but is yet to be issued with the licence; and

e. The Appellant considers that the closure order was malicious and was issued without according it any audience and is now suffering severe business losses as it has business loans and the losses suffered due to the closure orders are irrecoverable.

3. The Respondent opposed the Appeal on the following grounds:

a. That it issued the Appellant with an EIA licence but the licence conditions have been breached severally;

b. The residents of the neighbouring properties have complained to the Respondent on numerous occasions with regard to the noise and air pollution emanating from the Appellant's factory;

c. The toxic fumes from the Appellants facility have led to respiratory complications to the residents and is compromising the requirement for clean and healthy environment as required under Article 42 of the Constitution of Kenya;

d. The Respondent conducted inspections on 2nd October 2018, 4th October 2018 and 24th January 2019 and found the Appellant's facility to be emitting thick black smoke and fugitive emissions thus issued it with improvement orders but has failed to correct the situation;

e. The Respondent has deferred issuing a Stack Emission Licence to the Appellant as it had not complied with condition 2.5 (sic) that required the installation of air pollutants collection system to collect and treat fugitive emissions. The Appellant was not issued with a recycling licence because it did not have an Emission Licence;

f. There was a meeting attended by the Appellant, the Respondent and the representatives of the residents in the neighborhood but the Appellant to address the numerous complaints from the neighbouring communities but the Appellant did not heed to the mitigation measures that were agreed upon during the meeting;

g. The Respondent issued a closure order dated 4th January 2019 but erroneously dated 4th January 2019 to allow the Appellant to institute air pollution measures in compliance with Air Quality Regulations, 2014 (sic); and

h. Finally, the decision of the Respondent to close the factory was issued in the interim period and was precautionary pending the corrective measures to be taken by the Appellant. The Appellant further states that the decision was taken in exercise of the public duty bestowed on it and was in consultation with the Appellant and the public at large.

4. On their part, the Interested Parties argued that they are residents of Syokimau and their residences neighbour the factory and are entitled to a clean and healthy environment. They further stated that the suit herein has direct impact on them due to the significant fugitive emissions emanating from the factory and have been affecting their health negatively.

5. All the parties called witnesses in aid of their case and produced documents in support of their positions.

The Appellant's Case:

6. The first witness Gabriel Kiama, is the Operations Director of the Appellant. The witness rehashed the grounds of appeal as presented elsewhere in this judgment but stated that some of the techniques that the factory has deployed to control the pollution has been the installation of a cyclone, wet scrubbers, bag house, walling, cleaner technology (e.g scrap sorting, quality of furnace oil, scheduled filter cleaning and replacement). He also stated that the factory was suffering a loss of over 500 tonnes of steel at the cost of KShs. 82,000.00 for every tonne of steel that was not manufactured or sold.

7. The witness further stated that some of the complainants hiding behind the Respondent had instituted Net 194 of 2016 which was dismissed by the Tribunal and has not been appealed against.

8. He alleged that the Appellant invited the Respondent and Interested Parties to conduct a joint audit of the factory to ascertain the compliance levels but the Respondent went to the facility on 18th April 2019 without the requisite gadgets for carrying out the audit. The witness further stated that the Appellant has always engaged SGS KENYA LIMITED which he says is a reputable company accredited by NEMA, to prepare its annual self-audit reports.

9. Finally, the witness stated that the decision to close down the Appellant's facility was ill founded, unlawful and malicious and takes issue with the Respondent and Interested Parties prosecution of the appeal through the media.

10. The Appellant called the evidence of its second and final witness Mr. Benjamin Langwen who is an expert in matters environment having qualified in various disciplines in the environment sector. The witness relied on his witness statement and produced various documents among them being the Stack Emissions Report prepared by Ecoserv Consultants and dated 11th July 2019, the Environmental Noise Monitoring Report dated 28th June 2019 and the Occupational Air Quality Measurements for Endmor steel millers, Mlolongo Machakos County dated 12th July 2019.

11. The witness stated that the Respondent conducted a Control Environmental Audit (CEA) on 18th April 2019 but the said audit was not conducted properly because among other things, the Respondent did not have air quality monitoring sensors or equipment to measure and quantify the alleged pollution levels and the information collected during the audit is not useful to the audit process. On Air pollution management, the witness stated that the Appellant submitted the Air Emission Monitoring and Stack Emission measurement in 2017 and 2018 for review by the Respondent, paid the licence fees for the said licences but the Respondent has neither issued the Emission licences nor given any comments to the Appellant on the fate of its reports.

12. On the Noise Survey in the Appellant's Noise Monitoring Report, the witness stated that the reports and applications for those licences have been made but there are no responses from the Respondent to guide the factory. He urged the Respondent to issue the licences forthwith.

13. The witness further told the Tribunal that the sources of air emission is from the induction melting furnace and the re-heating furnace while noise emissions are generated from offloading of scrap metal and loading the finished products into vehicles. He explained that the emitted pollutants are nitrogen oxide, sulphur dioxide, particulate matter (dust, soot or smoke) and noise emissions.

14. Finally, the witness stated that the Appellant has heeded to all the requisite controls to ensure that all the emitted pollutants remain within the limits set in the Air Quality Regulations, 2014 as well as those of the Noise and Excessive Vibrations Regulations of 2009.

The Respondent's case

15. The Respondent called the evidence of three witnesses: Dr. John Mumbo, Mr. Newton Osoro and Zephaniah Ouma. The witnesses did not have witness statements but relied on the following documents: A control audit report dated 25th April 2019, ambient air monitoring report conducted by SGS laboratories on behalf of NEMA and dated September 2019, Environmental

Source Emissions Testing Report conducted by SGS laboratories on behalf of NEMA and dated July 2020, Reply and Statement of the Respondent filed on 6th May 2019 and Respondent's Statement of Reply dated 21st February 2019.

16. The witnesses were cross examined on the contents of the documents that they sought to rely upon but it emerged that they had not participated in the sampling or taking of data to generate the reports filed by SGS laboratories. The witnesses also appeared unfamiliar with the fine working details of the stacks and furnaces of the Appellant's factory.

17. That notwithstanding, the witnesses were steadfast that the Respondent had appointed SGS laboratories to carry out the works and they had faith in the reports. They stated that the Appellant has violated the air and noise regulations and ought to be closed.

The Interested Parties' Case

18. The interested parties called the evidence of four witnesses. Nazir Hussain Hakada, the 1st Interested Party gave evidence that he is a resident of Syokimau and house owner at Sawada Villas near the Appellant's factory. The witness stated that he settled in the area sometimes in April 2012 but the factory started operations in 2016. It was his evidence that the Appellant's factory has had grave negative impacts on the neighbouring community due to noise and air pollution emanating from the facility. The witness accused the Appellant of air pollution from the facility which increases at night and appears as greyish/darkish ashes. He stated that the dust that has settled within his house had the same appearance as to the dust that he saw at the factory on 18th April 2019 when he was allowed entry to participate in the CEA. He stated that the emissions are visible to the naked eye during the day and at night but they increase at night. As for the noise, the witness stated that the noise is unbearable at night and emanates from loading of metal products on lorries and offloading of materials well as crushing of scrap metals.

19. The witness stated that many children in the neighbourhood have developed eye and respiratory complications which affected his son and daughter. He claims that his son was hospitalized between 1st and 6th April 2019 and diagnosed with airway disease whereas his daughter was admitted in hospital on 6th April 2019 and succumbed on 9th April 2019 due to acute respiratory distress syndrome.

20. The Interested Parties also called the evidence of John Mutinda Mwanzia, the Third Interested Party who gave evidence that he has been a resident of Syokimau and a home owner there since 2003. He stated that he is involved in various initiatives within Syokimau in championing clean and healthy environment for the residents. He states that most of the residents in the area started settling as from the year 2008 and they do not recall participating in the change of user for the factory or the EIA licensing for the factory.

21. The witness stated that the community has tried to raise issues with the Appellant over the noise and air pollution emanating from its facility to no avail. The alleged emissions and noise are mostly elaborate at night.

22. As for the suit that is alleged as having being filed by the residents earlier being NET 194/2016, the witness states that the same was dismissed for lack of jurisdiction but the residents have persisted with their quest for a clean and healthy environment with the last effort being the Control Environmental Audit being carried out on 18th April 2019. The witness stated that the dust that the greyish/dark ash at the factory was similar to what had settled on the residences of most of the residents in the factory's neighborhood.

23. The Interested Parties also called the evidence of Franklin Maina Gatheru, the 4th Interested Party. He stated that he is a resident and home owner at Bustani Villas at Syokimau, having settled there in May 2008. The other evidence of the witness was generally similar to what had been stated by Mr. John Mutinda.

24. Lastly, the Interested Parties called the evidence of an expert, one Dr. Joseph W. Mukundi whose report was on the effects of exposure to nitrogen and sulphur dioxide. The witness described himself as a consultant toxicologist working as the Chair of the Toxicology Society of Kenya. In his report, the witness stated that the two gases (nitrogen dioxide (NO2) and sulphur dioxide (SO2) are naturally occurring but the nature of occurrence changes mainly due to combustion such as what happens in an industrial process. The bi-products of such combustions are oxides that end up being pollutants.

25. The report gives the effects of nitrogen oxides as causing increment in susceptibility to respiratory infection. Short term

exposure to nitrogen dioxide may have toxic effects after exposure to concentrations of 10 ppm for 10 minutes and this includes coughing, chest pain, frothy sputum and difficulty in breathing whereas concentrations of 10-20 ppm is mildly irritating to the eyes and higher concentrations are corrosive to the skin, eyes, and mucous membranes. The chronic toxicity following exposure to NO2 includes shortness of breath, pulmonary edema, which may progress to respiratory infections, reduction in the blood's oxygen carrying capacity, lung disorders, eye damage and digestive disorders.

26. As for sulphur dioxide, the report says that it is irritating to the eyes, mucous membranes and the respiratory tract. High levels of exposure produce cardiac arrest while moderate exposure produces pulmonary edema and low exposure results in systemic acidosis. On chronic toxicity (exposure), the witness stated that the lung function can be altered but there is no clear epidemiologic evidence that chronic exposure to SO2 has more serious effects in respiratory tissues in exposed populations.

27. The witnesses were extensively cross examined by the opposing counsel in the appeal and we have considered all the evidence emanating from such examination, all the documents filed in the suit, the submissions of counsel and all the authorities cited thereat. We find the closure order issued by the Respondent on 4th February 2019 to be raising only one issue for our consideration:

Whether the Appellant is compliant with the Environmental Management and Coordination (Air Quality) Regulations, 2014.

28. The dispute before this Tribunal emanates from the closure order addressed to the Appellant and dated 4th January 2019, which the Respondent later clarified was a typographical error, the letter ought to have been dated 4th February 2019 (hereinafter referred to as 'the closure order').

29. The allegation in the said closure order is that,

"In response to several environmental complaints received at the NEMA incident unit concerning air pollution from your facility, Environmental Inspectors from the Authority have conducted inspection at your facility on 2nd and 4th October 2018 and 21st January 2019 and established that the facility emits thick black smoke and significant fugitive emissions emanating from your melting unit. Corrective actions issued during each inspection, have not been complied with. According to the neighbourhood this has adversely affected their health through inhalation of toxic fumes which has a coughing effect."

"As a consequence, the Appellant was directed by the Respondent to carry out the following tasks:

"

i. STOP all operations that emit fumes into the air until you install air pollution control systems that will collect all the fugitive emissions from the melting units into the air pollution control units before discharge in the environment.

ii. Undertake a comprehensive public participation with the neighboring community to address their concerns.

iii. Conduct ambient air quality analysis and submit a compliance plan that shall include the elements stipulated in part XI of the Fifth Schedule of the Air Quality Regulations 2014.

iv. Submit a commitment letter to the Authority within 7 days.

v. Liaise with environmental inspectors on the ground to ensure smooth compliance with this order."

30. Section 2 of Environmental Management and Co-ordination Act (EMCA) defines a pollutant as follows,

"pollutant" includes any substance whether liquid, solid or gaseous which— (a) may directly or indirectly alter the quality of any element of the receiving environment; (b) is hazardous or potentially hazardous to human health or the environment; and includes objectionable odours, radio-activity, noise, temperature change or physical, chemical or biological change to any segment or

element of the environment;

31. At Section 78, EMCA provides that the Cabinet Secretary responsible for matter of environment shall on recommendation of the Respondent establish the ambient air quality standards, set the guidelines for air quality emissions and air pollution control.

32. Regulation 5 (1) of the **Environmental Management and Coordination (Air Quality) Regulations, 2014** provides that,

"(1) No person shall –

a. Act in a way that directly or indirectly causes, or is likely to cause immediate or subsequent air pollution; or

b. Emit any solid, liquid or gaseous or deposit any such substance in levels exceeding those set out in the First Schedule."

33. Regulation 7 of the Regulations provides that,

"*No person shall cause the ambient air quality levels specified in the First Schedule of these Regulations to be exceeded."*

34. The Appellant came to this Tribunal protesting the closure order and the accompanying directives issued to it by the Respondent. In its evidence, the Appellant insisted that it has complied with all the regulations and requirements for operating the factory and stated that it has not fallen back on its responsibilities. In the pendence of the appeal, the Tribunal ordered the Respondent to undertake measurements for the stack emissions, ambient air quality and the noise emanating from the factory. On 26th August 2019, the Appellant commenced the replacement of some items at the factory including a stack thus delaying the measurements as they could only be carried out once the factory was operating at full capacity.

35. The Appellant's witness, one Benjamin Langwen produced a Stack Emissions Assessment Report conducted on 10th and 11th July 2019 by Ecoserv Laboratory instructed by the Appellant. On stack emissions, for both the induction furnace stack and the section/rolling mill reheating furnaces, the report indicates that the gaseous and particulate emissions that are released from the induction furnace stack and the roll mill furnace stack are within the permissible levels under the regulations.

36. The witness further produced a report dated 12th July 2019 for the Occupational Air Quality Measurements for the Appellant. The gaseous emissions samples were taken between 30th May 2019 and 8th June 2019. The scope of the report was for Ecoserv to, *'take air quality measurements for particulates (sic), NOx, CO and SOx'*. The samples were taken from six sites identified as 2 sites on the boundary with the neighbours to the North, 3 sites within the activity compound and 1 site on the Mombasa road reserve.

37. The report filed by the Appellant returned a verdict that the ambient air quality was within the parameters set out in the regulations, however, "*The levels of NO2 were higher than the NEMA limits for all stations. The normal ambient levels of nitrogen dioxide are higher than the NEMA limits within Nairobi, particularly in Industrial Area and near road traffic since this pollutant is emitted by motor vehicles."* The report appeared to blame the higher concentration on nitrogen dioxide on traffic snarl ups along Mombasa road which is close to the factory.

38. The Respondent filed its report on the ambient air condition of the Appellant's facility. The report at its onset states that, "*The objective of the testing campaign was to measure particulate matter, metals and gaseous emissions from the induction and reheating furnace exhaust stacks and to compare the results with The Environmental Management and Co-ordination (Air Quality) Regulations, 2014 Emissions Guidelines and IFC EHS Guideline Values for Integrated Steel Mills)"*. The tests were conducted on 16th June 2020 for the Induction furnace and 19th June 2020 for the Reheating Furnace.

39. The results of the sampling for the induction furnace were that the particulate matter, the sulphur dioxide and the nitrogen dioxide concentrations were all within the limits set out in the Regulations.

40. The results of the sampling for the reheating furnace were that the particulate matter concentrations were within the limits set in the regulations but the results for the sulphur dioxide and the nitrogen dioxide were above the Regulations. For that reason, the SGS

Laboratory recommended that the Appellant does install an effective emission control technology on the reheating furnace that will reduce the emission levels to comply with the allowed limits.

41. The Appellant's expert witness Mr. Langwen discredited the report filed on behalf of the Respondents stating that the measurements ought to have taken near the neighbours' households and not within the factory.

42. It emerged during examination of the witnesses that the report produced by the Appellant was prepared by a company by the name Ecoserv Consultants but was produced by the environmental expert of the Appellant who does not work for Ecoserv Consultants while the report produced on behalf of the Respondent was prepared by SGS Kenya Limited but produced by the officers of the Respondent.

43. Dr. Mumbo who produced the report of SGS admitted that he was not present when the measurements were being taken but was consistent that SGS Laboratory had been retained by the Respondent to take the measurements as it did and he had full confidence in the report.

44. It also emerged during the cross examination of Mr. Osoro, one of the Respondent's witnesses, that all the parties herein were represented during the CEA that brought forth the audit report of 25th April 2019. The witness stated that the hood installed by the Appellant was not wide enough to capture all the fugitive emissions from the processes of the factory and finally, he stated that the first step in detecting air pollution is by observation of emissions with the naked eye then proceed to order for measurements to get the actual pollution levels.

45. The Appellant is aggrieved by the closure of its factory yet in its view it has already complied with all the relevant regulations for the operation of its business. On the other hand, the Respondent holds the view that it closed the factory because of non-compliance on the part of the Appellant. The ambient air quality and the stack emissions carried out by the parties appear to be at variance. The Appellant's report indicates compliance and blames any indication of non-compliance on the capture of some gases from Mombasa road which neighbor's the factory. On the other hand, the Respondent has filed its report which indicates that there is a level of compliance save for sulphur dioxide and nitrogen dioxide emitted from the reheating furnace.

46. It is instructive to note that both the Appellant and the Respondent took separate measurements for the induction furnace and the reheating furnace. The Appellant allowed the Respondent's agent (SGS Limited) to place the equipment to take the measurements inside the factory and was obviously aware that the measurements were being taken.

47. SGS Limited has been contracted by the Appellant in the past to carry out tests for self-assessment of the factory during the annual application for the emission licence for the factory. These reports were filed on 24th June 2019 in the Appellant's List and Bundle of Documents. As a matter of fact, all the reports in the Tribunal's record that have been conducted by SGS Kenya Limited when acting under the instructions of the Appellant indicates that the Appellant has always been complying with the Regulations. The Appellant did not provide any cogent evidence to the Tribunal to discredit the results of the reheating furnace which found that the emissions of SO2 and NO2 had exceeded the permissible limits.

48. It is common ground and has been submitted by all parties and expert evidence of Dr. Mukundi, the toxicologist, was taken to the effect that the emissions from the Appellant's factory especially nitrogen dioxide, sulphur dioxide, particulate matter, carbon monoxide among others are harmful to human health and ought to be arrested before they interact with human beings. It is also admitted by all parties that the Appellant's factory is constructed and is operating almost side by side with human settlements.

49. The Interested Parties have given evidence of the emissions from the Appellant's facility which according to them (the Interested Parties) normally increases at night. Mr. Nazir Hussain Hakada, being the 1st Interested Party gave evidence and alleged that his children suffered respiratory diseases as a result of which he says that his daughter succumbed and he blames it on the Appellant's factory. Although we are sympathetic for his loss, there was no evidence of any birth certificate, death certificate or post mortem report to back the claims hence we are not able to authoritatively apportion any blame to the 1st Appellant's factory for the sad occurrence.

50. Having considered the rival evidence of in the appeal, we find that the Appellant's emissions for sulphur

dioxide and nitrogen dioxide for the reheating furnace had exceeded the permissible emission levels as at July 2020 when the samples were collected for the Source Emissions Testing Report and the Environmental Noise Measuring Report by SGS Limited.

51. The contested closure notice was basically with regard to gaseous emissions, however, parties have taken a tangent and expanded their evidence and submissions to issues that have not been covered in the said closure order.

52. In **Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd (2015) eKLR** the Court cited with approval a decision of the Nigerian Supreme Court, "In **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and our Court of Appeal agreed that;**

'…. it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

53. All the parties herein have addressed us on the question of noise pollution under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution (Control) Regulations, 2009 (hereinafter referred to as 'noise regulations'). This is in spite of the fact that the closure order is based on gaseous emissions and not noise pollution.

54. The Tribunal frowns upon the practice of raising new issues during adduction of evidence yet such issues do not form part of the appeal, however, due to the high public interest in the appeal, the sensitivity of the issues involved and the obvious acquiescence of all parties to entertain the matter that was not the original dispute, we shall address the matter of the noise pollution in brief.

55. Regulation 2 of the Noise Regulations define noise and noise pollution as follows:

"noise" means any undesirable sound that is intrinsically objectionable or that may cause adverse effects on human health or the environment;

"noise pollution" means the emission of uncontrolled noise that is likely to cause danger to human health or damage to the environment;

56. The Appellant claims to have complied with the noise regulations. Indeed, the Appellant's Environmental Noise Monitoring report dated 28th June 2019 shows that there is compliance with the Noise Regulations, however, the Respondent produced a report prepared by SGS Limited signed on 30th July 2020 in which the conclusion is that the Appellant has not complied with the Noise Regulations.

57. It is common ground among all the parties that noise is an irritant that can have negative impacts on human health. The Appellant's report on noise pollution at the introduction states that, *"The major consequences of occupational noise are health related issues with hearing impairment being characterized as the main one. Annoyance, disturbance of speech and communication, stress, increased risk of accidents, disturbance of psychosocial well-being and psychiatric disorders are some of the other effects associated with occupational noise. According to a report by World Health Organization in 2011 on 'Burden of disease from noise quantification of healthy life years lost in Europe', stress associated with long term noise exposure can lead to long term health effects such as hypertension, acute myocardial infarctions, strokes and dementia. The report further outlined a strong link between cardiovascular disorders and exposure to occupational noise."*

58. The Appellant took the noise measurements between 30th May 2019 and 8th June 2019. The sampling for the points where the measurements were taken were as follows: 2 sites on the boundary with neighbors to the north, 3 sites within the factory's compound and 1 site on the Mombasa road reserve. The measurements were taken during daily activities of the factory.

59. The results of the noise levels posted by the Appellant indicate that the noise levels for the factory and the and the neighborhood were largely within the permissible limits save for two sites which were above limits which it blamed on activities in the neighborhood such as traffic. Curiously though, the Appellant has based its parameters on limits of 90 dB (A) for industry

environment. We shall come back to this matter.

60. In its report for the survey that was carried out between 25th June 2020 and 30th June 2020, SGS Kenya Limited established four monitoring points at the following points: south west side boundary of the plant near the main gate and along Mombasa road where the noise environment components are steel plant activities and vehicular traffic along Mombasa road, the eastern side boundary of the plant and the western side boundary of the plant and the north eastern side boundary of the plant are all used to measure the noise environment component of the steel plant activities.

61. The conclusion of the survey was that the factory was emitting noise that was way above the Noise Regulations, the IFC/World Bank Guidelines, The Factories and other Places of Work (Noise Prevention and Control) Rules, 2005 (L.N No. 25 of 2005) and WHO Guidelines for Community Noise in Specific Environments.

62. The Interested Parties gave oral evidence that the noise from the factory is unbearable and mostly emanates from loading and offloading scrap metals and metal bars at the facility as well as crushing of scrap metals and it gets more disturbing at night.

63. In its report, SGS Limited states that noise can be generated from scrap deliveries, scrap handling and furnace charging, site vehicular traffic including mobile plant, knock out/shake out activities, transportation handling (loading, transfers) and vehicular traffic on the busy Mombasa Road.

64. The Appellant states that the permitted noise levels for industries is 90 dB (A) and contends that it is not emitting beyond those permitted levels, however, the evidence that has so far been brought in this appeal shows that the area also hosts residential houses such as the Interested Parties whose maximum permissible noise levels range between a sound level of 55 dB (A) during the day and 25 Noise Rating Level (NR) during the night. We do not wish to dwell much on this issue because it is not among the pleaded matters in dispute and it might come before us some other day for determination. In the circumstances, the parameters to be used in measuring the noise being emitted by the factory cannot be those used in an industrial setting.

65. We find that the as at July 2020, the Appellants were emitting noise that was beyond the maximum permissible levels of the Noise Regulations.

66. The Interested Party attempted to introduce the question of whether the factory is situate in an industrial or residential area. That is not a matter in dispute between the Appellant and the Respondent and we associate ourselves with the holding of the Supreme Court of Kenya in **Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):**

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. ***An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court" [emphasis supplied].***

67. The Appellant argued that the Interested Parties had instituted NET 194 of 2016 which was dismissed by the Tribunal and are now litigating through the Respondent. We have perused the record in NET 194 of 2016 and found that the Appellants in the said appeal are not listed as parties to this Appeal. We have also established that NET 194/2016 was dismissed for want of jurisdiction of the Tribunal, therefore, the reference to the said Appeal is not relevant to these proceedings.

What orders should the Tribunal make

68. Having considered all the issues raised by all the parties in this matter, it leaves no doubt in our minds that the Appellant has a genuine concern about its investment in the steel milling plant that it set up at Syokimau with the full authority of the Respondent. On the other hand, the Respondent is duty bound to ensure that all persons within the Republic of Kenya are complying with the law as required under EMCA, the Regulations thereof and all other applicable laws. The Interested Parties are also entitled to live in a clean and healthy environment.

69. Evidence has been led that the emissions from the Appellant's factory and mainly the NO2, SO2 and noise are contested matters which require to be resolved urgently as they all have extreme negative health impacts on human beings. In issuing the contested closure order, the Respondent stated that it was reacting to complaints at its incident unit and also following inspections that it had conducted at the factory in the past.

70. Sustainable development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. In the instant case, the Respondent has accused the Appellant of putting the lives of the populace at risk by emitting beyond the acceptable standards hence the argument that the Appellant is entitled to 'its sustainable development' as argued by its advocates cannot hold.

71. Precautionary principle requires that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This Tribunal is enjoined under section 3 of EMCA to consider precautionary principle when exercising its judicial powers as we are now doing.

72. Steel milling is not an illegal activity in the Republic of Kenya. The Respondent issued an EIA licence to the Appellant on 28th October 2013 for the 'Construction of a two storey office block, a cafeteria, a dispensary, scrap yards and parking areas and *installation of a steel rolling and melting plant*'. The Respondent is the body charged with enforcement of environmental matters is deemed to be aware of its duties in measuring or causing measurements to be carried out to establish the extent of compliance with the law.

73. It is from this background that the Tribunal was taken aback by Dr. Mumbo's answer to a question fielded by the Tribunal, that even the legally permissible levels of emissions from the Appellant are harmful to the health of humans. Having licensed the Appellant to set up a factory at Syokimau, which the Appellant now terms as being for the use of residential and industrial purposes, it is inconceivable for the Respondent to appear to disown the Appellant.

74. The Appellant gave evidence of bank facilities that it has sought to support its operations and it is common knowledge that setting up and running a steel mill requires massive resources. The logical question that one would ask is why the Respondent would issue an EIA licence for a project that it believes should not exist in the first place. The issuance of EIA licences must surely be based on the law and not on the whims of the officer on duty on a particular date or season.

75. The Tribunal was further taken by surprise by the admission by the Respondent that it does not have capacity to carry out monitoring of air quality as need arises. As a matter of fact, the Respondent's Director General swore an affidavit on 23rd July 2020 in response to an Application that was pending at the Tribunal, to state that the Respondent's mobile laboratory required to be serviced hence was not available as some of its parts required to be sent to South Africa for maintenance.

76. Section 78 of EMCA, Regulations 53 and 58 of the Regulations require the Respondent to take a front row seat in measuring and monitoring ambient air quality. Unfortunately, the Respondent has either neglected its statutory duty or is starved of resources to manage its affair, which we must say are of extreme importance to this nation.

77. The First Schedule of the Regulations provides the Ambient Air Quality Tolerance Limits. The order issued by the Respondent to close the factory was made without granting it any hearing to the Appellant. It would be expected that in accordance with the Fair Administrative Actions Act, the Respondent would have taken actual measurements of the gaseous emissions and any other emissions that it deems noxious and make it the subject of a hearing in the presence of all the concerned parties before the closure of the factory. Such measurements would then be taken as the grounds for the adverse action taken by the Respondent and to require

that there be compliance. In our view, this is the proper procedure to follow when issuing closure orders as issued in this case. To do otherwise would be a departure from the Rule of law and points to arbitrariness on the part of the Respondent.

78. Having established that there were some lapses in compliance with the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 and Environmental Management and Co-Ordination (Air Quality) Regulations, 2014 as well presented in the reports of SGS Kenya Limited for July 2020, we shall order compliance in the terms as we shall set out below.

79. All parties have submitted to us that there have been upgrades conducted at the factory since the issuance of the closure order. If the matter is left as is, there will be no end to the acrimony between the Appellant and the Interested Parties and this judgment will not have offered a logical conclusion to the dispute.

80. Section 129 (3) (b) of EMCA provides that,

"Upon any appeal, the Tribunal may:-

(a) Confirm, set aside or vary the order or decision in question;

(b) Exercise any of the powers which could have been exercised by the authority in the proceedings in connection with which the appeal is brought; or

(c) Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just."

81. The Appellant has had more than 22 months to remedy whatever may have been causing the excessive emissions at the factory or the complaints being complained of by the neighbors. On 4th September 2020, the Tribunal ordered the downscaling of the operations of the factory for it to run between 6 a.m and 6 p.m. For any logical measurements to be taken, to check compliance, the factory must be operating in full capacity.

82. We note that the closure order does not provide definite timelines for compliance thus leaving the matter for interpretation by the parties. In the circumstances, the Tribunal shall exercise the powers bestowed upon it under sections 129 (3b & c) of EMCA and make the following orders:

a. The Appellant does ensure that there is compliance with the directions contained in the Respondent's closure order dated 4th February 2019, within the next 14 days;

b. At the lapse of the 14 days in (a) above, the factory shall open to its full capacity and run for 60 days within which the Respondent, shall in consultation with the Appellant and the Interested Parties, take measurements of the stack emissions, ambient air quality emissions and noise emissions for the Appellant's factory to confirm compliance with the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 and Environmental Management and Co-Ordination (Air Quality) Regulations, 2014;

c. If the Appellant shall be found to have been non-compliant at the end of the 60 days in (b) above, the factory shall stand closed pending further orders from the Respondent and this Tribunal;

d. If the Respondent fails to carry out the measurements as ordered in

(b) above, the Appellant shall be deemed to have complied with the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 and Environmental Management and Co-Ordination (Air Quality) Regulations, 2014 but the Respondent shall be at liberty to carry out further tests to ensure that there is compliance with the law;

e. The matter shall be mentioned before the Tribunal on 3rd March 2021 to ensure compliance with the orders;

f. In the meantime, pending the re-opening in paragraph (b) above, the Appellant shall continue operating between 6 a.m and 6 p.m; and

g. Each party to bear own costs.

DATED AND DELIVERED AT NAIROBI, THIS 18TH DAY OF DECEMBER 2020.

Mohammed Balala.....Chairperson

Christine Kipsang.....Vice Chairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member